

Before the
Federal Communications Commission

In the Matter of:)	
Standardizing Program)	
Reporting Requirements for)	MB Docket No. 11-189
Broadcast Licensees)	

Pursuant to the Commission’s Notice of Inquiry, Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), the Hearing Loss Association of America (HLAA), Association of Late-Deafened Adults (ALDA), and the Cerebral Palsy and Deaf Organization (CPADO), collectively, “Consumer Groups,” respectfully submit these comments in the above-referenced proceeding. Consumer Groups support the proposal of the Public Interest Public Airwaves Coalition (“PIPAC”) urging the Commission to adopt enhanced disclosure requirements for broadcast programming.¹ In these comments, we focus on the portions of PIPAC’s proposal that would require broadcasters to disclose accessibility metrics, including: (1) whether and if so, how, programming during composite reporting weeks has been captioned; (2) which programs were not captioned and why; and (3) the total number of complaints regarding the accessibility of emergency programming.² Requiring these disclosures is an easy, low-cost method to help ensure that broadcasters are satisfying their accessibility obligations and gather valuable empirical data for setting important accessibility policy.

¹ Letter from Angela Campbell and Andrew Jay Schwartzman, Counsel for PIPAC to Julius Genachowski, Chairman of the FCC, MM Docket No. 00-168 and GN Docket No. 10-25 (Aug. 4, 2011) [hereinafter *PIPAC Letter*];

² *PIPAC Letter*, *supra* note 1, at 3-4; see Notice of Inquiry, Standardized Program Reporting Requirements for Broadcast Licensees, 76 Fed. Reg. 77,999, ¶¶ 31, 33 (released Nov. 14, 2011, published Dec. 15, 2011) [hereinafter *NOI*].

I. Disclosure of Composite Week Captioning Methods

We support PIPAC's proposal that broadcasters be required to disclose whether reported programming is closed captioned, and if so, the type of captioning used for the programming: off-line (pre-recorded), live, or electronic newsroom technique (ENT).³ The data afforded by such a requirement would be helpful for resolving outstanding issues in the Commission's long-pending rulemaking regarding non-technical quality standards, including the continuing use of ENT, for television captioning.⁴

Representatives of the deaf and hard of hearing community have repeatedly urged the Commission for nearly 15 years to exercise its statutory authority to adopt non-technical quality standards for closed captioning of television programs, including requirements for proper spelling, grammar, punctuation, placement, and other elements crucial to ensuring that captions actually make video programming accessible.⁵ Specifically, we have raised these issues before the Commission during its rulemaking regarding the captioning provisions of the 1996 Telecommunications Act,⁶ in a 2004 petition for

³ *PIPAC Letter*, *supra* note 1, at 3-4; *see NOI*, *supra* note 2, at ¶ 31.

⁴ Notice of Proposed Rulemaking, Closed Captioning of Video Programming, Telecommunications for the Deaf, Inc. Pet. for Rulemaking, CG Docket No. 05-231, 20 FCC Rcd. 13,211, 13,225-27, ¶¶ 44-48 (released July 21, 2005) [hereinafter *2005 NPRM*]; *see also* Record Refresh on Notices of Proposed Rulemaking, Closed Captioning Rules, CG Docket No. 05-231, ET Docket No. 99-254, 25 FCC Rcd. 15,056, 15,057-58 (released Oct. 25, 2010) [hereinafter *2010 Refresh*].

⁵ *E.g.*, Report and Order, Closed Captioning and Video Description of Video Programming, 13 FCC Rcd. 3272, 3342-3351, ¶¶ 214, 218 (released Aug. 22, 1997) ("[The National Association of the Deaf] states that some basic, but minimum, standards for captioning quality are needed to provide guidance for new entrants into the captioning field and to indicate what is legally required . . .") [hereinafter *1997 Order*], *reconsideration granted in part*, 13 FCC Rcd. 19,973 (released Oct. 2, 1998).

⁶ *E.g.*, *id.*

rulemaking,⁷ in 2005 comments regarding the rulemaking resulting from that petition,⁸ in 2010 comments regarding a subsequent refresh of the record to that rulemaking,⁹ and most recently in a 2011 petition for rulemaking.¹⁰

In particular, we have strenuously objected to the use of ENT, which involves generating captions for news programming directly from teleprompter or script feeds rather than the words actually spoken by news anchors and reporters and other audible events.¹¹ The use of ENT frequently denies viewers who are deaf and hard of hearing access to live field reports, breaking news and weather, critical emergency information, and any other unscripted spoken dialogue or audible events not reflected on the teleprompter or script feeds.¹² The Commission itself has long acknowledged the shortcomings of ENT and indicated that its use would eventually be phased out.¹³

Although the Commission's rules still permit the use of ENT as a substitute for live captioning in many circumstances, such as for broadcast programming outside of the top 25 markets,¹⁴ the Commission has before it a long-pending rulemaking which considers whether to limit or eliminate the use of ENT.¹⁵ Industry representatives have claimed in that proceeding that widespread use of

⁷ TDI, et al., Pet. for Rulemaking, Docket No. RM-11065, 35-39 (July 23, 2004).

⁸ Reply Comments of TDI, et al., CG Docket No. 05-231, 3-11 (Dec. 16, 2005).

⁹ Comments of TDI, et al., CG Docket No. 05-231, ET Docket No. 99-254, 3-5, 8-12 (Nov. 24, 2010) [hereinafter *2010 TDI Comments*]

¹⁰ TDI, et al., Pet. for Rulemaking, CG Docket No. PRM11CG (Jan. 27, 2011), [hereinafter *2011 TDI Petition*].

¹¹ E.g., *2010 TDI Comments*, *supra* note 9, at 8-12.

¹² E.g., *id.* at 8-9 (internal citations omitted).

¹³ *Id.* at 11 (internal citations omitted).

¹⁴ 47 C.F.R. § 79.1(e)(3); *see also* 47 C.F.R. § 79.1(d)(3), (d)(8).

¹⁵ *2010 Refresh*, *supra* note 4, 25 FCC Rcd. at 15,057-58.

ENT for local programming warrants its continued recognition by the Commission as a viable substitute for captioning.¹⁶

Requiring broadcasters to disclose whether their reported programming employs ENT instead of live or off-line captioning would provide invaluable empirical evidence of the current scope of ENT utilization. For example, evidence that stations utilize live or off-air captioning rather than ENT would indicate that the use of legitimate captioning is economically viable. In addition, evidence of widespread usage of ENT would indicate the extent to which viewers who are deaf or hard of hearing are being denied access to important local programming.

The data provided by the disclosure of captioning metrics for reported programming would help realize the data-driven policy promise of the Commission's Data Innovation Initiative to the Commission's vitally important work to improve the accessibility of video programming for all Americans.¹⁷ And because providing captioning information would take no more than checking an additional box when reporting particular segments during a composite week period, we expect that such a requirement would be minimally burdensome on broadcasters.

II. Exempt Programming

We further support PIPAC's proposal to require all broadcasters to disclose all programming, including but not limited to reported composite week programming, that is not captioned and the legal reason, if any, why it was not captioned.¹⁸ Again, such data would provide useful empirical evidence for the

¹⁶ E.g., Updated Comments of the Radio Television Digital News Association, CG Docket No. 05-231, ET Docket No. 99-254, 4-5 (Nov. 23, 2010).

¹⁷ Federal Communications Commission, Data Innovation Initiative, <http://www.fcc.gov/data> (last visited Jan. 25, 2012).

¹⁸ PIPAC Letter, *supra* note 1, at 4; see NOI, *supra* note 2, at ¶ 31.

Commission's consideration of the continued viability of exemptions to its captioning rules. Moreover, such data would help consumers develop a better understanding of what programming is not captioned and why, thus easing the captioning complaint process for consumers, broadcasters, and the Commission.

The Commission's closed captioning rules currently include 13 separate exemptions for various types of video programming and providers.¹⁹ These exemptions deny viewers who are deaf or hard of hearing the ability to experience numerous types of programming, including programs on channels making less than \$3 million in revenue annually,²⁰ those shown late at night,²¹ many political and other advertisements,²² certain local programming,²³ and interstitials, promotional announcements, and public service announcements.²⁴

As with ENT, representatives of the deaf and hard of hearing community have repeatedly asked the FCC to roll back or eliminate these exemptions over the past decade. In particular, the Commission is poised to reconsider the \$3 million revenue exemption in the same pending rulemaking considering the use of ENT.²⁵ Moreover, a January 2011 petition by TDI asks the Commission to reconsider several of the aforementioned exemptions.²⁶

Data regarding the extent to which broadcasters utilize these exemptions would prove invaluable in the Commission's ongoing considerations of the exemptions' continued viability. Requiring broadcasters to provide data about

¹⁹ 47 C.F.R. § 79.1(d).

²⁰ 47 C.F.R. § 79.1(d)(12).

²¹ 47 C.F.R. § 79.1(d)(5).

²² 47 C.F.R. § 79.1(a)(1).

²³ 47 C.F.R. § 79.1(d)(8).

²⁴ 47 C.F.R. § 79.1(d)(6).

²⁵ 2010 *Refresh*, *supra* note 4, 25 FCC Rcd. at 15,058.

²⁶ 2011 *TDI Petition*, *supra*, note 10, at 29-30.

why programming lacks captioning would help establish a baseline for the scope of uncaptioned programming and illustrate the frequency to which broadcasters actually utilize the Commission's captioning exemptions. To the extent that particular exemptions are not widely utilized, the Commission could eliminate them with little impact. For exemptions in wide use, the Commission could explore targeted policy alternatives to increase captioning of exempted programs and ensure the accessibility of video programming.

Beyond providing empirical evidence for use in the Commission's reconsideration of existing exemptions to the captioning rules, information regarding uncaptioned programming would ease the burden faced by consumers, broadcasters, and the Commission in resolving situations where captions are missing from particular programming. A 2010 report by the Commission's Office of Engineering and Technology and Consumer and Governmental Affairs Bureau noted that a significant majority of captioning complaints received by the Commission and video programming distributors involved captions that were missing altogether.²⁷ In response, distributors noted that many of these complaints stem from situations where programs were provided to the distributors without captions, rather than as a result of technical failures in distributor or consumer equipment.²⁸ It is likely that some of these complaints involved programming that lacked captions because, unbeknownst to the viewer, the programming was subject to a categorical exemption.

With data from broadcasters regarding uncaptioned programming, Consumer Groups can better help their constituents understand what types of

²⁷ *Report on Digital Closed Captioning* 6 (Oct. 27, 2010), <http://transition.fcc.gov/cgb/dro/ccreport.pdf>.

²⁸ *Id.* at 7.

programs are frequently uncaptioned by the broadcast stations in their area and why those programs are not captioned. Such efforts could reduce the burden on broadcasters and Commission staff in addressing complaints related to uncaptioned programming subject to a categorical exemption.

As the Commission notes, providing data on uncaptioned programming is unlikely to impose any substantial data collection burden on broadcasters.²⁹ In addition to the reasons set forth in the Notice of Inquiry, the Twenty-First Century Communications and Video Accessibility Act (“CVAA”) requires programming published or aired on television with captions to be captioned when subsequently delivered via Internet protocol (IP).³⁰ Thus, broadcasters must carefully track the captioning status of aired programs to coordinate with other entities in the distribution chain who must then caption the programs for subsequent delivery over IP. Reporting on programming that is not captioned should then be a simple matter of providing data already on file.

III. Emergency Access

Finally, we support PIPAC’s proposal to require broadcasters to report the total number of complaints in the previous quarter regarding emergency programming not accessible to people with disabilities.³¹ As the Commission acknowledges, “[p]roviding all viewers with accurate information regarding fast breaking [emergency] news is of great importance,” because such information “often affect[s] the safety and well-being of viewers.”³² Requiring broadcasters to disclose complaints regarding the accessibility of emergency programming

²⁹ *NOI*, *supra* note 2, at ¶ 31.

³⁰ Pub. L. 111-260, 124 Stat. 2751 § 202(b) (2010) (to be codified at 47 U.S.C. § 613(c)(2)(A)).

³¹ *PIPAC Letter*, *supra* note 1, at 4 & n.32; *see NOI*, *supra* note 2, at ¶ 33.

³² 1997 *Order*, *supra* note 5, 13 FCC Rcd. at 3386, ¶ 252.

would be an important step in ensuring compliance with rules designed to protect people with disabilities from being unable to access important emergency information.

Broadcasters are already required to transmit emergency programming in a way that can be fully perceived by people with disabilities.³³ Noncompliance with these rules, however, can put the safety of viewers who are deaf or hard of hearing at risk. For example, in the aftermath of the attacks on September 11, 2001, a large number of consumers who were deaf or hard of hearing reported loss of captions in some television news coverage, inconsistencies in captioned news coverage, and a much higher than usual caption error rate.³⁴ And failures to comply with the Commission's emergency accessibility rules hampered the ability for deaf and hard of hearing residents of the Gulf Coast to understand warnings, evacuation orders, sheltering instructions, and information about relief assistance during Hurricane Katrina in 2005 and its aftermath.³⁵

Because of the importance of the emergency accessibility rules, the Commission should implement PIPAC's proposal to require broadcasters to

³³ 47 C.F.R. § 79.2 requires video programming distributors to make emergency information accessible; for viewers who are deaf or hard of hearing, emergency information provided in the audio portion of programming must be provided either using closed captioning or other methods of visual presentation.

³⁴ Deaf and Hard of Hearing Consumer Advocacy Network & N. Va. Res. Ctr. For Deaf and Hard of Hearing Persons, *Emergency Preparedness and Emergency Communication Access: Lessons Learned Since 9/11 and Recommendations* (2004), available at <http://tap.gallaudet.edu/emergency/nov05conference/EmergencyReports/DHHCANEmergencyReport.pdf>. The report found that people who are deaf and hard of hearing most often cited television as the source they turned to for information in the aftermath of 9/11 and pointed to captioning problems as a source of frustration from receiving important information.

³⁵ Nat'l. Org. on Disability, *Report on Special Needs Assessment for Katrina Evacuees (SNAKE) Project*, available at <http://nod.org/assets/downloads/Special-Needs-For-Katrina-Evacuees.pdf>.

report the total number of complaints in the previous quarter regarding emergency programming that was not accessible to people with disabilities. The disclosure of the number of complaints would serve as a useful proxy to indicate to the public and the Commission where broadcasters are failing to make emergency programming accessible, thereby facilitating investigation and remediation of systemic problems while imposing no additional burden on broadcasters that comply with the Commission's rules.

We further propose two modest expansions to PIPAC's proposal that would provide the public and the Commission more useful information with minimal additional burden on broadcasters. First, we recommend that the Commission require broadcasters to break down the reported number of emergency accessibility complaints between (a) those that claim the emergency information provided was missing closed captioning or other visual presentation altogether, and (b) those that allege that visual information was presented, but was inconsistent, garbled, or otherwise incomplete or incomprehensible. Second, we recommend that the Commission require broadcasters to break down emergency complaint totals by emergency, or at least disclose the total number of distinct emergencies that were the subject of received complaints.

This additional data would afford the public and the Commission the ability to pinpoint and address potential patterns of noncompliance with greater accuracy. As the Commission recognizes, the fact that a single consumer has complained to a station does not necessarily mean that a licensee has violated a rule.³⁶ A large number of concentrated complaints of a single type with respect to a single emergency or a consistent pattern of similar complaints, however, could indicate a problem warranting greater attention and investigation. Access to

³⁶ *NOI*, *supra* note 2, at ¶ 31.

additional information would also help the public and the Commission to monitor the degree to which the current rules are meeting the needs of people with disabilities and identify specific shortcomings in need of remediation.

These requirements would impose no burden on those licensees that already comply with emergency accessibility rules. For broadcasters that do receive complaints, providing a modest level of additional information would impose only minimal burden.

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Respectfully submitted,
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